BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

DAHIR DIRSHE Claimant	)	
V.	)	
CARGILL MEAT SOLUTIONS CORP. Respondent	)	Docket No. 1,062,817
AND	)	
CHARTIS CASUALTY COMPANY Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the March 31, 2015, Award entered by Administrative Law Judge (ALJ) Pamela J. Fuller. The Board heard oral argument on September 9, 2015. Stanley R. Ausemus of Emporia, Kansas, appeared for claimant. D. Shane Bangerter of Dodge City, Kansas, appeared for respondent and its insurance carrier (respondent).

The ALJ found claimant sustained an 18 percent permanent partial impairment to the body as a whole. Additionally, the ALJ found claimant was terminated for cause and is not entitled to an award for a work disability.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Claimant argues he was not terminated for cause and is entitled work disability based upon a wage loss of 100 percent. Additionally, claimant contends he sustained an impairment of 19 percent to the body as a whole.

Respondent maintains claimant is not entitled to an award for a work disability because he was earning a wage in excess of 90 percent of his pre-injury earnings in an accommodated position before he was terminated for cause. Respondent argues claimant sustained a 17 percent impairment to the body as a whole.

The issue for the Board's review is: what is the nature and extent of claimant's disability?

FINDINGS OF FACT

Claimant is Somalian and does not speak, read, or write English. Claimant's education consists of two years of schooling in Somalia.[1] Claimant testified he performs manual labor jobs and can only understand Somalian. Claimant was employed by respondent as a tail cutter, using pneumatic scissors to cut the tails from cow carcasses. Claimant testified he sustained a series of injuries to his neck, chest, left arm and both shoulders on September 5, 2012, while performing repetitive work at respondent. Claimant was treated with physical therapy, medication, ice and heat, but stated the treatment was not helpful.

Dr. C. Reiff Brown examined claimant on January 10, 2013, at claimant's counsel's request. Claimant provided a history to Dr. Brown:

> In the course of [claimant's] work activity he has had gradual increasing pain involving both the shoulders. He describes this as starting out as a dull aching and gradually increasing until now it is sharp and stabbing. Any use of his hands above his chest level increases severity of the pain.[2]

Claimant indicated he had pain in his low neck and upper shoulders extending into his shoulder blades and chest. Dr. Brown reviewed claimant's medical records and performed a physical examination, finding tenderness, myofascial pain syndrome trigger points, and decreased range of motion in claimant's shoulders. Dr. Brown concluded:

> In my opinion, this man has severe rotator cuff tendonitis bilaterally. The severity of his limitation causes me to suspect that he has rotator cuff tears. He definitely has acromial impingement bilaterally. He also has developed myofascial pain syndrome involving the scapular and interscapular musculature. The distribution of trigger points in those muscular areas is typical of that diagnosis. He also appears to have some myositis involving the pectoral musculature and to a lesser degree the upper arm musculature.
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> In my opinion, the repetitive nature of this injury was demonstrated by his history, my physical examination, and review of the records. In my opinion, the work activity that he was performing subjected him to an increased risk which he would not have been exposed to in normal non-employment life. The increased risk or hazard that

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[1] Claimant testified at regular hearing he had two years of education in Somalia, though he informed vocational expert Doug Lindahl he had four years of Somalian education. (R.H. Trans. at 11; Lindahl Depo. at 7.)

[2] Brown Depo. at 6; Ex. 2 at 4.

> he was exposed to is the prevailing factor in causing this repetitive trauma situation. The repetitive trauma is the prevailing factor in causing his present condition and his need for additional treatment.[3]

Dr. Brown recommended conservative treatment and a referral to an orthopedic surgeon. Dr. Brown imposed permanent restrictions of: avoid frequent reaching of more than 18 inches from the body, avoid frequent reaching at arm's length above the head, no lifting above shoulder-level with either hand, and lifting between waist and chest level limited to 20 pounds occasionally and 10 pounds frequently.[4]

Dr. Alexander Neel first examined claimant on January 28, 2013, for complaints of bilateral shoulder pain. Dr. Neel performed a physical examination, noting claimant had hyper-exaggerated responses and was unable to cooperate in demonstrating range of motion. After a review of diagnostic studies, Dr. Neel concluded claimant has degenerative joint disease of both AC joints and a small tear of the right infraspinatus. Dr. Neel imposed work restrictions: "[n]o lift, push, pull, carry greater than [three pounds]. Work at table height. No hook or knife."[5]

Respondent accommodated claimant's work restrictions until he was terminated April 9, 2013. Respondent's records indicate claimant was terminated for workmanship and instruction: "[Claimant] was intentionally not cutting the tails. This caused unnecessary work on other workers and became a food safety risk."[6] Claimant testified he had problems working the scissors when he had shoulder pain, though he later testified the scissors operated by pushing a button, a job within the restrictions imposed by Dr. Neel. Claimant stated he was terminated because his equipment would not work. He said he could not cut tails when the scissors were jammed, and although he reported such to his supervisor for repair, it was only a matter of time before the scissors jammed again.

Daniel Medrano, kill floor supervisor, testified the pneumatic scissors are changed often, at least once per eight-hour shift. Mr. Medrano stated the scissors will be changed for an employee when requested, and he had them changed for claimant even when he felt it was not necessary. Mr. Medrano approached claimant more than once regarding his job performance. He testified:

> A. [Claimant] was just letting [the tails] all go by.

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[3] *Id*. at 10-11.

[4] See *id*., Ex. 2 at 5.

[5] Stip. (filed Mar. 2, 2015) at 5.

[6] Reid Depo., Ex. B at 2.

> Q. Letting them all or just letting one or two go by?
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> A. There was [*sic*] several times he was letting them all go by. That's definitely a violation of the company.
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> Q. And he told you during those periods of time that he couldn't cut them because the scissors were dull; isn't that right?
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> A. One time he stated the scissors were dull, which I got [them] changed out; and I think it was an hour later he continued letting them go by and I didn't understand why. Myself, I went up there; lead man went up to try [them]. Everything was working fine. He just continued just to let [them] go by.[7]

Human Resources manager Scott Reid testified claimant had been written up on more than one occasion prior to his termination for safety and job performance issues. In November 2011, claimant was not turning cattle for inspection and was written up. Claimant was again written up on January 5, 2012, for work performance issues. Claimant left his equipment and exited the office. Later, he chose to stay so respondent would not process a termination for job abandonment. Claimant was written up for job abandonment. Claimant was next counseled on July 17, 2012, because he was missing work on the first and last days of each work week. Mr. Reid agreed claimant's termination was justified and for cause.

Mr. Reid noted claimant was paid more than 90 percent of his average weekly wage while working his accommodated position. Debbie Henning, respondent's workers compensation coordinator, agreed with Mr. Reid and stated claimant would have continued to earn within 90 percent of his pre-injury wage but for being terminated for cause.

Employees may file a grievance with respondent's union, though it is not mandatory. Claimant did not file a grievance with the union related to his termination because he had problems with the union previously. Ms. Henning testified the plant has continued to run since April 9, 2013, the date of claimant's termination, and she is not aware of any issues with the scissor operation.

Claimant followed up with Dr. Neel and was released to regular work duties on May 6, 2013. Claimant continued to complain of bilateral shoulder pain and was provided medication. Dr. Neel noted claimant was "very difficult to treat in terms of his exaggerated responses on exam and his unwillingness to proceed with any type of treatment other than oral pills."[8] Claimant was released from Dr. Neel's care on June 3, 2013.

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[7] Medrano Depo. at 12-13.

[8] Stip. (filed Mar. 2, 2015) at 10.

Using the AMA *Guides*,[9] Dr. Neel determined claimant sustained a functional impairment of 13 percent to the right upper extremity and a functional impairment of 16 percent to the left upper extremity based on range of motion related to the shoulders. The parties stipulated these convert to an 8 percent and 10 percent impairment to the body as a whole, respectively, for a combined 17 percent functional impairment to the body as a whole.

Dr. Neel opined claimant may benefit from occasional over-the-counter medication and a home physical therapy program. He also wrote, "Regarding work restrictions, [claimant] has in place permanent work restrictions and these will stand as on record at the meat packing plant."[10]

Dr. Brown again examined claimant on October 8, 2013, at claimant's counsel's request. Dr. Brown found claimant had little change since his previous examination, though he noted a slight decrease in his range of motion. Dr. Brown determined claimant had reached maximum medical improvement and provided a rating opinion using the AMA *Guides*. Dr. Brown opined:

> [T]here is a 12% permanent partial impairment of function of the right upper extremity and a 15% permanent partial impairment of function of the left upper extremity on the basis of loss of range of motion of the shoulders. There is, in my opinion, an additional 5% whole body impairment based on the DRE Cervicothoracic Category II, the result of his myofascial pain syndrome. These values convert and combine to total 19% permanent partial impairment of function of the body as a whole.[11]

Doug Lindahl, vocational rehabilitation counselor, interviewed claimant on June 11, 2014. In a report dated June 16, 2014, Mr. Lindahl listed all tasks claimant performed in the five-year period prior to the date of accident. Dr. Brown reviewed the task list prepared by Mr. Lindahl. Of the three unduplicated tasks on the list, Dr. Brown opined claimant could not safely perform any, for a 100 percent task loss.

Mr. Lindahl testified the combination of claimant's lack of English and work restrictions would preclude him from employment in most locations. He opined claimant has no earning capacity in the Dodge City area, and thus has a 100 percent loss of earnings capacity. Mr. Lindahl was not provided medical records from claimant's treating physician, nor was he provided the records of Dr. Neel releasing claimant to regular duties.

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[9] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[10] Stip. (filed Mar. 2, 2015) at 12.

[11] Brown Depo., Ex. 2 at 2.

Mr. Lindahl agreed his opinion regarding claimant's ability to find work would be affected if claimant was able to perform his regular work duties.

PRINCIPLES OF LAW

K.S.A. 2012 Supp. 44-501b(c) states:

> The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2012 Supp. 44-508(h) states:

> "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2012 Supp. 44-510e(a)(2)(C) states:

> An employee may be eligible to receive permanent partial general disability compensation in excess of the percentage of functional impairment ("work disability") if:
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> > (i) The percentage of functional impairment determined to be caused solely by the injury exceeds 7½ % to the body as a whole or the overall functional impairment is equal to or exceeds 10% to the body as a whole in cases where there is preexisting functional impairment; and
> >
> > (ii) the employee sustained a post-injury wage loss, as defined in subsection (a)(2)(E) of K.S.A. 44-510e, and amendments thereto, of at least 10% which is directly attributable to the work injury and not to other causes or factors.
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> In such cases, the extent of work disability is determined by averaging together the percentage of post-injury task loss demonstrated by the employee to be caused by the injury and the percentage of post-injury wage loss demonstrated by the employee to be caused by the injury.

K.S.A. 2012 Supp. 44-510e(a)(2)(E)(i) states:

> To establish post-injury wage loss, the employee must have the legal capacity to enter into a valid contract of employment. Wage loss caused by voluntary

> resignation or termination for cause shall in no way be construed to be caused by the injury.

ANALYSIS

The ALJ found claimant was terminated for cause and limited the award of compensation to the extent of claimant's functional impairment. The Board agrees.

Respondent carries the burden to prove it discharged claimant for cause.[12] A Board majority has adopted the standard set forth in *Morales-Chavarin v. Nat'l Beef Packing Co.*[13] as the appropriate standard for determining if an employee was discharged for cause.[14] *Morales-Chavarin* set forth what constitutes "good cause to terminate" an employee. The Court of Appeals in *Morales-Chavarin* wrote:

> [T]he proper inquiry to make when examining whether good cause existed for a termination in a workers compensation case is whether the termination was reasonable, given all of the circumstances. Included within these circumstances to consider would be whether the claimant made a good faith effort to maintain his or her employment. Whether the employer exercised good faith would also be a consideration. In that regard, the primary focus should be to determine whether the employer's reason for termination is actually a subterfuge to avoid work disability payments.[15]

Before his injury, claimant was written up or counseled three times. On November 29, 2011, claimant was written up for not turning cattle so they could be inspected by the USDA.[16] On January 5, 2012, claimant was written up for work performance.[17] At that meeting, claimant left his equipment and left the room. He was then given a final written warning for job abandonment. Mr. Reid testified that these three infractions alone justified termination. On July 17, 2012, claimant was counseled for missing work on the first and last days of the work week.

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[12] See *Gutierrez v. Dold Foods, Inc.*, 40 Kan. App. 2d 1135, 199 P.3d 798 (2009).

[13] *Morales-Chavarin v. Nat'l Beef Packing Co.*, No. 95,261, 2006 WL 2265205 (unpublished Kansas Court of Appeals opinion filed Aug. 4, 2006), *rev. denied* 282 Kan. 790 (2006).

[14] See *Merrill v. Georgia Pacific*, No. 1,064,126, 2015 WL 3642455 (Kan. WCAB May 28, 2015).

[15] *Morales-Chavarin, supra,* at 5.

[16] See Ried Depo. at 7.

[17] See *id*.

After his injury and after claimant was placed on the job cutting tails, Mr. Medrano testified there were several instances where claimant let all the carcasses go by without cutting the tail off in violation of company policy. Claimant was taken to the office a "couple times" for counseling.[18] Claimant alleges he let the cattle go by because his scissors were dull. Mr. Medrano recalled one instance where he changed the blades in claimant's scissors and within an hour claimant was letting cattle go by without doing his job. Mr. Medrano testified he and his lead man checked the scissors and found they were not dull and functioned properly. The problem continued, and claimant was written up and terminated on April 9, 2013, for not cutting tails.

Based upon the facts presented, the Board finds respondent met its burden of proving claimant was terminated for cause.

The parties stipulated that Dr. Neel's functional impairment rating of 17 percent could be considered by the Board without supporting testimony from Dr. Neel. Dr. Brown found claimant suffers a 19 percent whole body impairment. The ALJ found the opinions of both physicians to be equally credible. The Board Agrees and find claimant suffers an 18 percent whole body functional impairment as the result of his injury by repetitive trauma.

CONCLUSION

Claimant was terminated for cause. Claimant suffers an 18 percent whole body functional impairment as the result of his injury by repetitive trauma while working for respondent.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated March 31, 2015, is affirmed.

IT IS SO ORDERED.

[18] Medrano Depo. at 12.

Dated this _____ day of October, 2015.

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BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

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Pamela J. Fuller, Administrative Law Judge